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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1314

JEAN VIVAUDOU,

Petitioner,

—v.—

ROYAL NATIONAL BANK OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST DEPARTMENT

BRIEF FOR RESPONDENT IN OPPOSITION

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Opinion Below

The opinion of the Supreme Court of the State of New York, not reported, appears in App. A of Petition.

Jurisdiction

The petition for a writ herein was not timely filed within the time prescribed by 28 U.S.C. 2101, to wit, 90 days from the entry of the order by the Appellate Division which was September 23, 1971, which appears in App. B of Petition. The Appellate Division alone had power to grant leave to appeal (New York CPLR 5602 (b)) and the Court of Appeals on November 18, 1971 by an order which appears in App. C dismissed the petitioner's appeal taken as of right.

The petitioner's motion for leave to appeal to the Court of Appeals, made in the Appellate Division, was not timely made as required by New York CPLR 5513 (c), in that the motion for leave to appeal had not been made within 30 days from the date of service upon petitioner's attorney of the order of the Appellate Division with notice of entry, to wit, September 24, 1971. The Appellate Division denied the petitioner's application for leave to appeal by an order which appears in App. D of the petition.

The time in which to petition for certiorari in this case began 90 days after September 23, 1971; the petitioner's untimely motion for leave to appeal to the Court of Appeals which was denied cannot operate to extend the time within which the petitioner could file his petition.

The time limitation in petitioning for certiorari in this case was December 15, 1971.

Questions Presented

Whether the petitioner, having made a motion to vacate the judgment on the ground that he had not been served with process, and having been defeated, in all of the Courts of New York, could raise that issue again collaterally.

Whether the principles of res judicata apply in this case.

Whether the question of jurisdiction of the New York Supreme Court having been fully and completely litigated, can that question be collaterally attacked.

Whether, assuming en arguendo, that the decisions made by the New York Courts were erroneous, was the petitioner (the unsuccessful party in all of the New York Courts) deprived of his property without due process of law within

the Fourteenth Amendment of the Constitution, where he has been fully heard in the regular course of judicial proceedings.

Whether, there are any special or important reasons shown in the petition for certiorari herein, why consideration should be given to the petition under the provisions of Supreme Court Rule 19.

Statute Involved

Fourteenth Amendment of the Constitution

Statement of the Case

On May 7, 1957 the respondent recovered a judgment against the petitioner in the sum of $21,089.31 in the New York Supreme Court. Service of the summons and complaint was made by one, Herman Kruger, on April 3, 1957. The action was based on guaranties of payment of loans made by the respondent to a corporation of which the petitioner was a principal. The petitioner failed to appear or answer, by reason of which default, judgment was entered against him.

On January 18, 1967 the petitioner, as judgment debtor, was served with a restraining notice and a subpoena *duces tecum*. At the time of such service the petitioner and Sol S. Perlow, Esq., attorney for respondent had a talk in which the petitioner said he was aware of the judgment, recalled having been served with the summons and complaint and that since he had no assets there was nothing the respondent could do to enforce payment of the judg-

ment. He also stated that since he had no defense to the action it would have been useless to engage an attorney.

Several days after the service of the notice to restrain, the petitioner called the respondent's attorney and asked for an adjournment of the examination. Petitioner also requested such an adjournment in a letter to respondent's attorney.

During February 1967, the petitioner called at Perlow's office and told Perlow that he had no assets but would try to borrow some money from his stepmother, Rose Vivaudou, and would try to work out a settlement of the judgment. He further stated on that occasion that the Manufacturers Hanover Trust Company had recovered a large judgment against him and that he was judgment proof.

On December 4, 1968, the appellant was again served with a subpoena *duces tecum*, returnable December 18, 1968. On December 17, 1968, a stipulation adjourning the examination scheduled for December 18, 1968 to February 5, 1969, was entered into and signed by the petitioner as judgment debtor and receipt of a copy of the stipulation was acknowledged by the petitioner.

At the petitioner's request a subpoena served on Grand Maison De Parfums Inc., of which petitioner was president, was adjourned to February 19, 1969.

On June 4, 1970, Vivaudou told Perlow that his stepmother, Rose Vivaudou, had died and that he was a legatee of her estate. A garnishee order was served on the executor of the Rose Vivaudou estate on July 8, 1970.

On July 13, 1970, Perlow again served a subpoena *duces tecum* on the petitioner as judgment debtor. At the same

time a subpoena was served on Grand Maison De Parfums, Inc. On July 14, 1970, the petitioner told Perlow that he was about to receive $25,000.00 to $30,000.00 from the settlement of an action and that he would arrange to settle the judgment.

The petitioner failed to attend the examinations scheduled.

At no time during the pendency of the various judgment enforcement proceedings did Vivaudou deny his knowledge of the judgment or the service of the summons and complaint in the action.

The petitioner's challenge to the jurisdiction of the Court appeared for the first time in the affidavit and order to show cause dated in November 1970 when the petitioner made an application in the New York Supreme Court to vacate and set aside the judgment entered against him.

The petitioner in his affidavit made in November 1970 denied having been served with process. The petitioner did not dispute the fact that he became aware of the judgment against him upon the service of the subpoena and notice in January, 1967. For four years after such notice the petitioner negotiated with the respondent's attorney, signed stipulations adjourning examinations, was served with additional papers, wrote letters, and had meetings with respondent's attorney. At no time during the four years did he dispute the service of the summons and complaint upon him. It was not until November 1970 that mention was made of lack of jurisdiction of the Court. At the time of the service of the order to show cause to vacate the judgment thirteen years had elapsed since the entry of

the judgment and four years since the institution of proceedings to enforce payment of the judgment.

The petitioner's allegation on page 7 of the petition herein that he "showed that on April 3, 1957 and for several months prior thereto he resided in Puerto Rico" is not the fact. To support his allegations concerning residence in Puerto Rico he annexed to his affidavit "copies" of letters which he stated were sent by him from Puerto Rico and which letters were allegedly dated April 2, 1957 and April 8, 1957. In the petitioner's brief on his appeal to the Appellate Division it was stated that one of the said exhibits "was only a xerox copy of a copy of the original letter" and the admitted change as to date appearing thereon was "merely a writing over to prepare for the making of a clearing xerox copy."

Apparently, the Supreme Court gave little credence to the petitioner's claim of non-service and his specious "documentary proof." On the other hand, the respondent's evidentiary facts showed conclusively that the challenge to the jurisdiction of the Court was an afterthought which did not and could not impress the Court.

ARGUMENT

The issue in the present case is uniquely narrow, and no amount of strained semantics can convert it into one warranting review by this Court on certiorari.

The petitioner having moved to vacate the judgment in the New York Supreme Court and such motion having been denied, cannot attack the judgment. The petitioner having been defeated as to the issue of service of process, is concluded and cannot raise it again collaterally. The petitioner tendered the jurisdiction fact controversy to the New York courts, and having lost, he is not free to use the same contention again. *Vander* v. *Casperson,* 12 N.Y.2d 36, 236 N.Y.S.2d 33.

Schwaimm v. *Davis,* 18 A.D.2d 1070, 239 N.Y.S.2d 579.

The principles of res judicata apply in this case and the question of jurisdiction of the New York Supreme Court has been fully and completely litigated and the question of jurisdiction is immune from collateral attack.

The leading case with the facts almost identical to those presented in this case is *American Surety Co.* v. *Baldwin,* 287 U.S. 156 where the opinion of this Court was delivered by Mr. Justice Brandeis. The reasons given by Mr. Justice Brandeis in his opinion, are wholly applicable to the situation here at hand.

On pages 165-166 it was stated:

> "The Supreme Court of Idaho had jurisdiction over the parties and of the subject matter in order to determine whether the trial court had jurisdiction. Clearly, the motion to vacate, made on a general ap-

pearance, and the appeal from the order thereon, were no less effective to confer jurisdiction for that purpose than were the special appearance and motion to quash and dismiss held sufficient in *Baldwin* v. *Iowa State Traveling Men's Assn.*, 283 U.S. 522. And there was an actual adjudication in the state court of the question of the jurisdiction of the trial court to enter judgment. The scope of the issues presented involved an adjudication of that issue. Compare *Napa Valley Elec. Co.* v. *Railroad Commn.*, 251 U.S. 366; *Grubb* v. *Public Utilities Commn.*, 281 U.S. 470, 477-478. The Supreme Court of Idaho did not refuse to adjudicate that question when it declined to 'construe the legal effect of the undertaking in question further than to examine it in aid of determining the sole question of the court's jurisdiction to hear and determine the motion for judgment thereon.' It narrowed the issue, according to the State procedure, by separating, in effect, the question of jurisdiction from that of liability. It held that the status of the Surety Company as a party to the litigation, by virtue of its execution of the bond in the cause, necessarily persisted, although its liability may have been limited by the terms of the bond. With the soundness of the decision we are not here concerned. It is enough that the court did not, as the Surety Company asserts, reach its decision by merely assuming the point in issue, or by deeming itself concluded by the fact that the trial court took jurisdiction. That it did not so reach its decision is made clear by the opinion itself. We are thus brought to a consideration of the effect on the present suit of the judgment of the Supreme Court of Idaho.

The full faith and credit clause, together with the legislation pursuant thereto, applies to judicial proceedings of a state court drawn in question in an independent proceeding in the federal courts. Act of May 26, 1790, c. 11; Act of March 27, 1804, c. 56, §2; Rev. Stat. §905; *Mills* v. *Duryee*, 7 Cranch 481, 485; *Insurance Co.* v. *Harris*, 97 U.S. 331, 336. Compare *Bradford Electric Light Co.* v. *Clapper*, 286 U.S. 145, 155. The principles of *res judicata* apply to questions of jurisdiction as well as to other issues. *Baldwin* v. *Iowa State Traveling Men's Assn.*, 283 U.S. 522. They are given effect even where the proceeding in the federal court is to enjoin the enforcement of a state judgment, if the issue was made and open to litigation in the original action, or was determined in an independent proceeding in the state courts. See *Marshall* v. *Holmes*, 141 U.S. 589, 596; *Fidelity & Deposit Co.* v. *Gaston, Williams & Wigmore*, 13 F.(2d) 267, aff'd per curiam, *id.*, 268. The principles of *res judicata* may apply, although the proceeding was begun by motion. Thus, a decision in a proceeding begun by motion to set aside a judgment for want of jurisdiction is, under Idaho law, *res judicata*, and precludes a suit to enjoin enforcement of the judgment. *Bernhard* v. *Idaho Bank & Trust Co.*, 21 Idaho 598; 123 Pac. 481. Since the decision would formally constitute *res judicata* in the courts of the state; since it in fact satisfies the requirements of prior adjudication; and since the constitutional issue as to jurisdiction might have been presented to the state Supreme Court and reviewed here, the decision is a bar to the present suit insofar as it seeks to enjoin the enforcement of the judgment

for want of jurisdiction. Cf. *Fidelity Nat. Bank & Trust Co.* v. *Swope*, 274 U.S. 123, 130-131."

Moore's Federal Practice, Sec. 60.37(3) 77 A.L.R. 2d 1425.

The denial of the petitioner's motion to vacate the judgment in the State Court did not deprive the petitioner of any constitutional right.

The case of *Freyberger* v. *N. W. Harris Co.*, 273 N.Y. 115; 6 N.E.2d 398, is much in point to the instant case. There the Court in refusing to entertain an appeal where the appellant claimed that the Court had jurisdiction because there was involved a question of the constitutions of the State and the United States, said:

"The alleged constitutional question directly involved is that the judgment violates the Fourteenth Amendment to the United States Constitution, for the reason that the decision and judgment are not responsive to the issues; that the court failed to give due weight to the evidence produced by appellant; and that the court acted arbitrarily in applying erroneous principles of law. Appellant made a motion for a new trial, in which he stated: 'That the findings in favor of defendants, the decision and judgment of the Court deprive plaintiff of his property without due process of law and in violation of the Fourteenth Amendment to the Constitution of the United States and of article 1, section 6, of the Constitution of the State of New York."

The gist of his claim is that the judgment granted by the Special Term and unanimously affirmed by the Appellate Division is wrong, and that he has been deprived of

his property without due process of law. We are unable to see that there is any constitutional question directly involved on this appeal. Appellant has had his day in court; has had a trial lasting about nine days; and all issues which the court decided relevant under the applicable rules of law have been decided by the court in a decision which contains over a hundred findings of fact.

"It is firmly established that when parties have been fully heard in the regular course of judicial proceedings an erroneous decision of the state court does not deprive the unsuccessful party of his property without due process of law within the Fourteenth Amendment of the Constitution of the United States." *Bonner* v. *Gorman,* 213 U.S. 86, 91, 29 S. Ct. 483, 485, 53 L. Ed. 700.

In 47 Am. Jur. 2nd on page 275 it is stated:

§1289. *State court judgments in federal courts.*

The Constitution of the United States provides that full faith and credit shall be given "in each state" to the public acts, records, and judicial proceedings of every other state. Although judicial proceedings in the federal courts are not explicitly included within such provision it is to be noted that the federal statute enacted pursuant thereto provides that the properly authenticated records and judicial proceedings shall have full faith and credit "in every court within the United States." This statute has been held to extend the rule of the Constitution to federal courts, so that a federal court sitting in a state is bound equally with the courts of the state to observe the command of the full faith and credit clause. Hence, a federal court will accord to a judgment of a state court the

same effect as is given to it by the court of the state in which it is rendered.

Thus, it may be observed that a judgment of a state court having the requisite jurisdiction will operate as res judicata and a bar in a federal court. This rule has even been applied to a state court's erroneous adjudication of a federal question, which is a bar to a subsequent litigation of such question between the same parties in a diversity case in a federal court.

There appears to be no special or important reasons why consideration should be given to the petition for a writ herein in view of the provisions of Supreme Court Rule 19. In fact, the petition is wholly lacking in merit.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Dated, May 2, 1972.

Respectfully submitted,

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